85-1866

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CSEA LOCAL UNION 1000,
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO,
Petitioner,

—against—

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
Respondent,

—and—

HELEN CARTER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

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QUESTIONS PRESENTED

Whether attorneys fees may be awarded to an intervenor in an action brought by the United States Secretary of Labor pursuant to Title IV of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. §481 et seq.

PARTIES TO PROCEEDING

Plaintiff Raymond J. Donovan, Secretary, United States Department of Labor is the plaintiff herein. Helen Carter is the plaintiff-intervenor and CSEA Local Union 1000, American Federation of State, County and Municipal Employees, AFL-CIO, is the defendant.

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PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

CSEA Local Union 1000, American Federation of State, County and Municipal Employees, AFL-CIO, the petitioner herein prays that a Writ of Certiorari issue to review the judgment of United States Court of Appeals, Second Circuit, entered in the above-entitled case on February 14, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Second Circuit, dated and entered February 14, 1986, is reported at 784 F.2d 98 (1986) and is printed in Appendix "A" hereto, infra, page "A-1".

The decision of the United States District Court, Northern District, New York rendered July 26, 1985, is unreported and is printed in Appendix "A", hereto, infra, page "A-13". The order filed August 1, 1985 is printed in Appendix "A", infra, page A-16.

The previous decision of the United States District Court, Northern District of New York dated July 19, 1984 is reported at 594 F. Supp. 188 (1984) and is printed in Appendix "A", infra, page A-17. The previous decision of the United States Court of Appeals, Second Circuit dated May 1, 1985 is reported at 761 F.2d 870 (1985) and is printed in Appendix "A" infra, at page A-36.

JURISDICTION

The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254(1) and Rule 17.1(c) of the Rules of this Court in that a Federal Court of Appeals has decided an important issue of Federal Law which has not been but should be settled by this Court.

STATUTORY PROVISIONS INVOLVED

This case involves Title IV, Sections 401-404 of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§481-484. Said statutory provisions are set forth verbatim in Appendix "B" infra, page "B-1".

STATEMENT OF CASE

This proceeding was commenced on or about January 31, 1983 by the United States Secretary of Labor pursuant to Title IV of the Labor Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. §481 et seq. seeking to annul the regularly scheduled triennial election of Statewide officers of the Civil Service Employees Association, Inc. (CSEA) conducted between May 15 and June 15, 1982. The Secretary sought an order declaring

that CSEA had violated Section 401(d) of the LMRDA, 29 U.S.C. §481(b), by failing to conduct the election for the Statewide officers by secret ballot and an order declaring that CSEA had violated Section 401(e) of the LMRDA, 29 U.S.C. §481(e), by:

1. Imposing unreasonable candidacy requirements;

2. Imposing candidacy requirements in a non-uniform manner;

3. Denying members in good standing a reasonable opportunity for the nomination of candidates; and

4. Denying members in good standing the right to be a candidate. (The procedural history of the underlying election case, and the appeal thereof, is more fully set forth in the opinion of the United States Court of Appeals, Second Circuit, at 761 F.2d 870 and the opinion of the District Court (Miner, J.) at 594 F. Supp. 188 annexed in Appendix "A", infra.)

As a remedy in the proceeding, the Secretary of Labor sought a new election conducted under his supervision.

Helen Carter, a CSEA member who had filed the initial election complaint with the Secretary brought on a motion to intervene in March of 1983. Intervention was initially denied by District Judge Miner in a decision dated May 27, 1983. In a subsequent motion, Carter's application for intervention was granted.

The Secretary filed a motion for partial summary judgment regarding the secret ballot issue and on his claim that CSEA's nominating procedures were unreasonable. CSEA also filed a motion for partial summary judgment upon the ground that intervenor Carter had not properly exhausted her internal union remedies with respect to her complaint regarding the nominating procedures. By decision and order dated July 19, 1984, the District Court granted the Secretary Summary Judgment on the secret ballot issue, holding that CSEA has failed to conduct the election by secret ballot. However, the Court denied the Secretary's motion for partial summary judgment with respect to the nominating procedures. The Coourt also denied CSEA's motion concerning exhaustion of remedies. In its decision, the Court ordered CSEA to conduct a new election within 90 days supervised by the Secretary. Said election was held on October 15, 1984.

The Secretary appealed from the District Court's order insofar as it held that CSEA's nominating procedures were reasonable and in compliance with Title IV of the LMRDA. CSEA cross-appealed that part of the order which denied its motion for partial summary judgment on the exhaustion of remedies issue.

By decision dated May 1, 1985, the Court of Appeals, Second Circuit, reversed the District Court insofar as the District Court found CSEA's nominating procedures reasonable and not in violation of the LMRDA and affirmed the order insofar as it concluded that Carter had exhausted her internal union remedies. See, *Donovan v. CSEA, Local Union 1000*, 761 F.2d 870 (2d Cir. 1985), annexed hereto in Appendix "A", infra, at page .

In June of 1985, intervenor Carter filed a motion for attorneys fees in the amount of $38,785.86. By decision dated July 26, 1985, the District Court, per Judge Miner, rendered its decision and awarded the intervenor the sum of $7,112.10. An order was filed on August 1, 1985. Both intervenor and CSEA appealed.

By decision dated February 14, 1986, the United States Court of appeals, Second Circuit, held that though Title IV of the LMRDA does not explicitly authorize the award of attorneys fees to intervenors, that attorneys fees are permissible under the "common benefit" exception. The Court increased the award of counsel fees to the amount of $8,649.60.

Judge Winter dissented concurring with the opinion of Justice White in his dissent from the denial of Certiorari in *United Steel Workers v. Sadlowski*, 435 U.S. 977 (1978).

REASONS FOR GRANTING WRIT

The issue presented herein, to wit: whether attorneys fees may be awarded to an intervenor in an action brought by the United States Secretary of Labor pursuant to Title IV of the LMRDA, 29 U.S.C. §481 et seq., sets forth an important question of Federal Law which has not been, but should be, settled by this Court (Rule 17.1(c) of the Rules of the Supreme Court). The issue was one of first impression to the Second Circuit and warrants resolution by this Court.

The general "American Rule" bars, in the absence of statutory authorization, awards of attorneys fees to the prevailing party in Federal litigation. *Alyeska Pipeline Company v. Wilderness Society*, 421 U.S. 240 (1975). An exception to the "American Rule" is the "common benefit" theory.

In *Hall v. Cole*, 412 U.S. 1 (1973), the Supreme Court applied this "common benefit" exception and awarded attorneys fees in an action under *Title I* of the LMRDA, 29 U.S.C. 411 et seq. In Title I cases, an individual private litigant, can assert violations of the "Bill of Rights" set forth in Title I.

This proceeding, however, is mentioned pursuant to Title IV of the LMRDA, not Title I. Pursuant to Title IV of the LMRDA, the Secretary of Labor has sole and exclusive authority to commence actions regarding union elections. Pursuant to Section 402(a) of the LMRDA, 29 U.S.C. 482, a member of a labor organization who has exhausted internal union remedies may file a complaint with Secretary of Labor challenging a union election. Pursuant to the statutory scheme of Title IV, the Secretary is charged with the responsibility of investigating such a complaint and

> "If he finds probable cause to believe that a violation of this Title (IV) has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principle office to set aside the invalid election . . ., 29 U.S.C. 482(b)."

An individual union member may not commence his own action to challenge a union election. Said action must be commenced by the Secretary of Labor pursuant to Title IV.

Though the Labor Management Reporting and Disclosure Act was enacted in 1959, it was not until 1972 that the Supreme Court acknowledged that the union member who filed the original complaint with the Secretary of Labor could intervene in the

Secretary's action, *Trbovich v. United Mine Workers*, 404 U.S. 528 (1972). In *Trbovich*, it was noted that the Secretary's interest in Title IV litigation was an interest of *all* union members in democratic union elections, *Wirtz v. Local 153, Glass Bottle Blowers' Association*, 389 U.S. 463, 475 (1968). Discretionary intervention was permitted by the Supreme Court in that the Secretary's interest might be somewhat different than the interest of the individual union member who filed the original complaint with the Secretary.

It is important to reiterate, however, that the Secretary's interest in Title IV litigation is to represent the interest of all union members to insure democratic union elections ("common benefit"). This contrasts with the interest of the individual union member, who was permitted to intervene to protect his *own* interest.

Three Federal Circuits, the Third, Ninth, and the District of Columbia, have cited *Hall v. Cole, supra*, for the proposition that attorneys fees may be awarded to intervenors in Title IV cases under the "common benefit" theory. *Rollison v. Hotel, Motel and Restaurant Construction Camp Employees*, 677 F.2d 741 (9th Cir. 1982); *Donovan v. International Brotherhood of Teamsters, Local 70*, 661 F.2d 1199 (9th Cir. 1981); *Brennan v. United Steel Workers of America*, 554 F.2d 586 (3rd Cir. 1977), Cert. den. 435 U.S. 977 (1978); *Marshall v. United Steel Workers of America*, 666 F.2d 845 (3rd Cir. (1981)) cert. den. 459 U.S. 823 (1982); *Usery v. Local Union 639, International Brotherhood of Teamsters*, 543 F.2d 369 (D.C. Cir. 1976) Cert. den. 429 U.S. 1123 (1977).

Though the above referenced circuits have awarded attorneys fees in Title IV cases under the "common benefit" theory, the reasoning of Mr. Justice White, and two of his fellow justices, in the dissent to the denial of Certiorari in *United Steel Workers of America v. Sadlowski*, 435 U.S. 977 (1978), questions the rationale of said decisions.

As noted above, prior to the Supreme Courts decision in *Trbovich*, an individual member had no right to intervene in a Title IV action. The Supreme Court held in *Trbovich* that the objecting union member may intervene in a Title IV action commenced by the Secretary of Labor "so long as that intervention

is limited to the claims of illegality presented by the Secretary's complaint", 404 U.S. at 537. The Supreme Court reasoned that the granting of intervention would make the union liable to or to relatively little additional burden. Id. at 536.

Mr. Justice White in his dissent in *Sadlowski* critically recognized that the granting of attorneys fees could be an additional burden upon the union which could become quite costly and questioned whether an individual's intervention could create a common benefit. Mr. Justice White stated:

> "The contribution made by an individual union member, however, who intervened in an action brought by the Secretary of Labor, can only with great difficulty be viewed as the creation of a common benefit. The Secretary has already investigated the case, and is already conducting the suit. And the rationale permitting intervention was not to duplicate the efforts of the Secretary. Intervention was held permissible in *Trbovich* in order to protect a union member's interest, or his choice of how to present that interest, precisely to the extent that the individual's interest diverged from the Secretary's. The Secretary is the champion of "vital public interest" in assuring free and democratic union elections that transcends the narrower interest of the complaining union member. *Trbovich, supra,* at 539, citing *Wirtz v. Local 153, Glass Bottle Blowers' Association,* 389 U.S. 463 (1968). Hence, the rationale that provides for the right to intervene in the first place substantially undercuts the intervenor's claim to be creating a significant common benefit not already provided by the Secretary." *United Steel Workers of America v. Sadlowski,* 459 U.S. at 979.

Mr. Justice White's closing is quite prophetic:

> "The awarding of attorneys fees to intervenors in Title IV proceedings threatens seriously to obstruct the administration of the LMRDA. The common benefit exception has in this case been stretched beyond the

> bounds of its creative rationale, both as to whether a benefit has been shown to exist at all, given the Secretary's dominant enforcement role, and as to whether it is fair to tax the entire union with the costs of providing what benefits there might be." Id. at 980.

In *Marshall v. International Brotherhood of Teamsters, Local Union 20,* 509 F. Supp. 926 (N.D. Ohio 1981), the United States District Court for the Northern District of Ohio also rejected the expansion of the common benefit rule to Title IV election matters. The Court held that pursuant to Title IV of the LMRDA, the Secretary of Labor is the guardian of the public interest and confers the common benefit upon all union members. The Court held:

> "This Court finds that an award of attorneys fees to plaintiff intervenors is inconsistent with their limited role permitted by *Trbovich* . . . contrary to the rationale of the *Trbovich* decision, an award of attorneys fees would impose an additional burden on the union, and would create the possibility of whether a "common benefit" was conferred on an identifiable class of beneficiaries. The Court feels that such results were not intended by the Supreme Court when it permitted limited intervention in the *Trbovich* case." Id. at 928.

It is submitted that the extension of the "common benefit" theory to Title IV cases is inconsistent with that statute's legislative history. The courts that have awarded attorneys fees in Title IV cases have ignored, in essence, the fact that Congress specifically rejected a bill, H.R. 8342, 86th Cong., 1st sess. Section 402(a) (1959), which would have provided for individual union member suits under Title IV and authorized the award of appropriate relief, including attorneys fees. Additionally, a review of Titles I, II, III and V of the LMRDA will demonstrate that each Title, with the exception of Title IV, contains specific statutory authorization for either an award of attorneys fees or the granting of other "appropriate relief." For example, see 29 U.S.C. §431(c); 29 U.S.C. §510(b). The lack of an equivalent grant of

remedial authority is readily explainable by the fact that the Congress left to the Secretary of Labor the function of insuring compliance with Title IV and protecting the rights of all union members (the "common benefit").

Title IV constitutes the kind of explicit, comprehensive and exclusive remedial scheme that may bar the recovery of attorneys fees. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, (1967). Although *Fleischmann* has been greatly limited by the subsequent *Mills v. Electric Auto-Light Company* decision, 396 U.S. 375, (1970), it is submitted that the "common benefit" rationale for the award of attorneys fees in *Hall v. Cole, supra*, is inapplicable to Title IV actions where the burden of enforcement falls, not on an individual member, but rather on the Secretary of Labor.

This dominant enforcement role must be contrasted to the limited role of the intervenor under *Trbovich*. The United States Supreme Court in *Trbovich* granted the possibility of intervention because of a private, individual interest of the intervenor differing from that of union members in general. But it is the union membership as a whole to whom such a common benefit must flow. It cannot be claimed that a Title IV intervenor can obtain any benefit, common or individual, without a Civil action being commenced by the Secretary of Labor who is acting as the "public's" lawyer.

CONCLUSION

Wherefore, petitioners respectfully pray that a writ of certiorari be granted.

DATED:

Respectfully submitted,

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APPENDIX

APPENDIX A

Decision of the United States Court of Appeals, Second Circuit, February 14, 1986

LUMBARD, *Circuit Judge:*

This appeal presents the question of whether a plaintiff-intervenor who aids the Secretary of Labor in mounting a successful challenge to union election procedures under Title IV of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. §§ 481-483 (1982), may recover attorney's fees from the defendant union.[1] We hold that attorney's fees may be granted to Title IV intervenors and affirm the district court's award in the present case; however, we believe that the district court should also have allowed fees for the time spent by intervenor's counsel on the fee application itself.

Because the events leading up to this petition for attorney's fees have been detailed in *Donovan v. CSEA Local Union 1000*, 594 F. Supp. 188 (S.D.N.Y. 1984), *aff'd in part and rev'd in part*, 761 F.2d 870 (2d Cir. 1985), we only briefly recapitulate. Intervenor Helen Carter is a member of the defendant union, the Civil Service Employees Association ("CSEA"), which represents approximately 200,000 employees of the State of New York and its various political subdivisions. Carter wanted to run in the union's 1982 election for the statewide office of Secretary. She failed to obtain the endorsement of a select "nominating committee" although the incumbent was automatically placed on the ballot in accordance with the union's constitution. Carter was also unable to get on the ballot through the alternative procedure of obtaining signatures from 2% of the union's membership—approximately 3,800 names based on 1982 membership—within 6 weeks of being rejected by the committee.

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[1] Other Courts of Appeals have held that such fees may be granted in Title IV cases. *See Rollison v. Hotel, Motel, Restaurant and Construction Camp Employees, Local 879*, 677 F.2d 741 (9th Cir. 1982); *Donovan v. Local 70 International Brotherhood of Teamsters*, 661 F.2d 1199 (9th Cir. 1981); *Brennan v. United Steelworkers (District 15) (District 31)*, 554 F.2d 586 (3rd Cir. 1978), *cert. denied sub nom. United Steelworkers v. Sadlowski*, 435 U.S. 977 (1978) (White J., dissenting); *Usery v. Local 639 International Brotherhood of Teamsters*, 543 F.2d 369 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1123 (1977). *But see Marshall v. International Brotherhood of Teamsters, Local 20*, 509 F. Supp. 928 (N.D. Ohio 1981).

After protesting within the union the decision not to place her name on the ballot, Carter retained Daniel E. Clifton and filed suit against CSEA in the Eastern District of New York. She sought a preliminary injunction prohibiting the union from conducting the election. CSEA contested the court's jurisdiction, arguing that it was a public employee labor union and, therefore, not covered by the LMRDA or the Labor Management Relations Act. Carter's counsel was able to demonstrate, however, that CSEA represented a number of private-sector employees in industries affecting interstate commerce and that the federal labor laws were applicable. On May 13, 1982, Judge Sifton denied Carter's request for a preliminary injunction on the ground that Carter had failed to show a likelihood of success on the merits. This litigation was later dismissed as moot.

CSEA conducted a mail ballot election from May 15 to June 15, 1982. After the results were announced, Carter protested through union channels the nominating procedures and the lack of a secret ballot, but union officials refused to consider her protests, stating that they were untimely filed.

In August, 1982, Carter submitted an election complaint to the Secretary of Labor, pursuant to §402(a)(1) of the LMRDA, 29 U.S.C. §482(a)(1) (1982). Her counsel provided documentation to satisfy the Secretary that the CSEA was subject to the LMRDA. Counsel also provided the Secretary with material to show that Carter had exhausted her internal union remedies – a stauttory prerequisite to the Secretary's exercising jurisdiction to investigate a union member's complaint. *See id.*

The Secretary then filed suit against CSEA in the Northern District on January 31, 1983. Carter subsequently intervened as a plaintiff. The Secretary sought a declaration that CSEA had violated § 401 (b) of the LMRDA, 29 U.S.C. § 481(b) (1982), by failing to use secret ballots to conduct the election for statewide offices. The Secretary also alleged that CSEA's nominating procedures violated § 401(e) of the LMRDA, 29 U.S.C. § 481(e) (1982) by instituting an arbitrary committee selection process and unreasonable signature requirements for the nomination of certain candidates.

The Secretary moved for partial summary judgment on the secret ballot issue. CSEA cross-moved for summary judgment on the ground that Carter had not exhausted her internal union remedies. At the request of William M. Gonzalez, the attorney for the Department of Labor, Carter's counsel prepared papers in opposition to CSEA's cross-motion. On June 29, 1984, the court granted the Secretary's motion and denied the union's cross-motion. *See* 594 F. Supp. at 194-197.

Soon thereafter, the Secretary moved for partial summary judgment on the issue of CSEA's nominating procedures. The district court denied this motion stating that the use of the nominating committee standing alone violated the LMRDA, but that the signature procedure afforded candidates a reasonable opportunity to appear on the ballot. It concluded, however, in light of its decision on the secret ballot issue, that a rerun of the 1982 election would be required. *See* 594 F. Supp. at 188-194. A new election was held under the Secretary's supervision on October 15, 1984.[2] Carter appeared on the ballot but lost.

The Secretary appealed the denial of summary judgment on the issue of CSEA's nominating procedure. CSEA cross-appealed the district court's finding that Carter had exhausted her administrative remedies. Carter again intervened, filed a brief, and argued against the union's cross-appeal. On May 1, 1985, we affirmed the district court on the issue of exhaustion of remedies but reversed on the issue of nominating procedures. *See* 761 F.2d 870 (2d Cir. 1985). We held that the signature method for getting on the ballot did not save CSEA's nominating procedures from attack because the signature requirement was not uniformly applied to all candidates, but rather imposed a significant burden on those not selected by the committee method.

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[2] Prior to the district court's decision, CSEA had agreed to discontinue its practice of automatically placing incumbents' names on the ballot. Moreover, in the rerun election, the Union required a member rejected by the committee to obtain only 1000 petition signatures, instead of the 2% figure of 3800, order to have the member's name placed on the ballot.

After our decision, Carter petitioned the district court for costs and attorney's fees. Carter sought compensation for her counsel's work in this lawsuit and in establishing that CSEA was governed by the LMRDA in the Eastern District litigation. Carter sought fees for 369 1/4 hours of attorney time at the rate of $100 per hour, plus costs of $861.20, for a total of $38,785.86. CSEA opposed the grant of fees arguing that there is no basis for such an award under Title IV and, in the alternative, that the amount sought was excessive.

The district court requested a statement from the Secretary on whether attorney's fees may be awarded to intervenors under Title IV and, if so, the appropriate amount to award to Carter. The Secretary declined to take a position on these issues and instead simply catalogued the assistance Carter's counsel had rendered. The Secretary explained that Carter's counsel had: (1) helped in ascertaining that CSEA was subject to federal jurisdiction under the LMRDA; (2) provided material showing that Carter had exhausted her internal union remedies; and (3) aided during the appeal of the nominating procedures issue by serving as a "ready reference" for information and by agreeing to limit his argument to dealing with CSEA's cross-appeal so that the Secretary could focus on the nominating procedure issue.

In a decision read from the bench, Judge Miner (then a district judge) held that attorney's fees are recoverable by an intervenor in a Title IV action, but that the amount Carter had requested was excessive. The court made no award for work performed by counsel during the unsuccessful Eastern District litigation, on the appeal of the instant case, or on the fee application itself. Judge Miner then disallowed half of the remaining hours submitted on the ground that they duplicated the Secretary's representation. Finally, the judge reduced the fee multiplier from $100 to $75, the prevailing rate in the Northern District for assisting, as opposed to lead, counsel. To this the judge added a small allowance for expenses and for the fees of local counsel bringing the total award to $7,112.10. The award was made in an order dated July 30, 1985.

Carter appeals that part of Judge Miner's decision in which he refused to award fees for counsel's work on the appeal or on the fee application itself. CSEA cross-appeals, seeking reversal of Judge Miner's determination that Title IV permits a fee award. CSEA argues, in the alternative, that Carter's counsel's work was so duplicative of the Secretary's efforts that the award should be even further reduced or affirmed.

It is true that Title IV does not explicitly authorize the award of attorney's fees to intervenors and the American Rule is that attorney's fees are not available to the prevailing party in federal litigation in the absence of statutory authorization. *See Alveska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 257-259 (1975). However, as the *Alyeska* court stated, "Congress has not repudiated the judicially fashioned exceptions to the general rule against allowing substantial attorneys' fees. . . ." *Id.* at 260.

We hold that the award of attorney's fees to Title IV intervenors is permissible under the "common benefit" exception to the American Rule. This exception permits a court to compensate a successful plaintiff where his efforts have resulted in a substantial benefit to the members of an identifiable class of defendant beneficiaries. *See Hall v. Cole*. 412 U.S. 1, 5-7 (1973); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 393-94 (1970).

In *Hall*, the Supreme Court held that attorney's fees may be awarded to individual union members who bring suit to enforce the "Bill of Rights" guarantees of Title I of the LMRDA. The court reasoned that a successful Title I plaintiff, though primarily seeking to vindicate his own interests, also benefits his fellow union members by promoting the free speech rights guaranteed by Title I. 412 U.S. at 8; *see also Usery v. Local No. 639 International Brotherhood of Teamsters*, 543 F.2d 369, 382-83 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1123 (1977) (citing "common benefit" awards in cases under Titles III and V of the LMRDA).

We believe that the logic of *Hall* and the LMRDA "common benefit" cases should be extended to allow attorney's fees to Title IV intervenors. We are mindful that the enforcement scheme of Title IV differs from that of the other LMRDA Titles. Although

the other Titles rely on the private enforcement efforts of individual union members,[3] Title IV gives the Secretary of Labor exclusive authority to bring post-election challenge suits and permits the aggrieved election candidate to intervene solely to support the Secretary's complaint. *See Trbovich v. United Mine Workers*, 404 U.S. 528, 530-537 (1972). We hold, nevertheless, that Title IV's requirement that the Secretary prosecute post-election challenge suits does not mean that courts may not recognize the contribution of individual union members and reimburse them for their expenses. As complainants and *Trbovich* intervenors, "[t]heir contribution may yield a substantial, and properly compensable, benefit to the membership exceeding that derived from the Secretary's efforts." *Usery, supra*, 543 F.2d at 383.

The first step in Title IV enforcement is for a union member to challenge the election through internal union procedures. The Secretary of Labor has no duty or authority to investigate a complaint until union procedures have been exhausted or have proven futile. If the Secretary finds probable cause to believe that a violation has occurred, he must bring an action to set aside the invalid election within 60 days of the filing of the union member's complaint. *See* LMRDA § 402, 29 U.S.C. § 482 (1982). The Secretary may seek to overturn an election only on grounds raised in "some discernible fashion" by the union member's protest to the union. *Hodgson v. Local 6799, United Steelworkers*, 403 U.S. 333, 340-41 (1971); *see also Wirtz v. Local 125, Laborers'*, 389 U.S. 477, 484 (1968).

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[3] Title I, the Bill of Rights of union members, relies on private enforcement by union members and provides for "such relief (including injunctions) as may be appropriate," 29 U.S.C. § 412 (1982). Title II, reporting provisions, also relies on private enforcement, but expressly provides for the discretionary award of attorney's fees, 49 U.S.C. § 431(c) (1982). Title III, union trusteeships, provides for private enforcement, and, like Title I, approves the issuance of such relief as may be appropriate, 29 U.S.C. § 464(a) (1982). Title V, fiduciary responsibility of union officers, permits union members to sue privately, and specifically indicates that attorney's fees are part of the "appropriate relief" recoverable, 29 U.S.C. § 501(b) (1982).

Thus, the use of enforcement procedures by the Secretary depends on the diligence of the individual union member. *See Brennan v. United Steelworkers (District 15) (District 31)*, 554 F.2d 586, 595 (3d Cir. 1977), *cert. denied sub nom. United Steelworkers v. Sadlowski*, 435 U.S. 977 (1978) (White J., dissenting). The Secretary's authority to sue and any benefits that ultimately accrue to the union membership through the Secretary's prosecution derive from the initial efforts of the individual complainant.

Given the individual union member's pivotal role in Title IV enforcement, it is essential that the member be able to obtain competent counsel. The burden of investigating violations and pursuing them through union channels is an onerous one, and the individual union member may not be able to get the necessary assistance of counsel if attorney's fees are unavailable. Thus, the availability of attorney's fees is fundamental to the protection of union members' rights under Title IV.

We note that a contrary view has been expressed by Justice White. In a dissent from the Court's denial of certiorari in *United Steelworkers v. Sadlowski*, 435 U.S. 977, 77-980, he disputed the propriety of invoking the "common benefit" exception to the American Rule on behalf of intervenors in Title IV cases. He argued that because *Trbovich* limited the intervenor's role to pressing, in his own individual manner, the claims of illegality presented in the Secretary of Labor's complaint, it is the Secretary, not the intervenor, who provides the "common benefit" by championing the public interest in free and democratic union elections. *Id.*

This argument minimizes the importance of the intervenor's initial role in bringing possible Title IV violations to the Secretary's attention. Even if the intervenor provides little benefit at the *trial* stage compared to that provided by the Secretary,[4]

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[4] Although the individual union member's contribution is most important during the period before the Secretary takes over, the individual's more limited role as an intervenor does not necessitate the conclusion, as a matter of law, that the member can render no further benefit once the Secretary has assumed control of the litigation. The intervenor may obtain information which might

(footnote Continued)

the intervenor usually confers a substantial benefit on the union membership by identifying, investigating and presenting for the Secretary's ultimate prosecution, evidence of union violations of Title IV.

The case before us is instructive. Carter's counsel performed essential investigative work which later aided the Secretary on the jurisdictional question of whether the union was subject to the LMRDA. Counsel also guided Carter's protest through union channels, thereby laying the foundation for the Secretary's challenge to CSEA's nominating procedures and to CSEA's failure to use a secret ballot.

These contributions by Carter and her counsel redounded to the benefit of the entire CSEA membership. As the *Hall* decision notes, when the individual union member vindicates his rights under the LMRDA, the membership as a whole benefits from the promotion of union democracy. *See Hall, supra,* 412 U.S. at 8-9. The individual's present victory creates a beneficial impact on the future conduct of the union's affairs.

As a direct result of the efforts of Carter and her counsel, it has been shown that CSEA is covered by the LMRDA, thus guaranteeing CSEA's members all the important protections of that Act. Carter's challenge was not to a single district election, but to a statewide election. Moreover, the benefits from this successful litigation are not limited to the supervised rerun of one isolated election, but will continue to be felt in future CSEA elections. As the whole membership of CSEA has shared in the fruits of Carter's labors, it is fair to charge the membership with some of the costs of these labors under the "common benefit" rational. *See Rollison, supra,* 677 F.2d at 748; *Brennan, supra,* 544 F.2d at 604-07; *Usery, supra,* 543 F.2d at 383.

Footnote Continued

be difficult for the Secretary to find; and, a plaintiff-intervenor may offer significant contributions to the court's understanding of the case. See Brennan, supra, 554 F.2d at 595; *Usery, supra,* 543 F.2d at 384. *See also Marshall v. United Steelworkers,* 666 F.2d 845 (3d Cir. 1981). *cert. denied,* 459 U.S. 823 (1982).

The determination as to the extent to which the intervenor has provided a "common benefit" is best made by the district court.

In urging that awards of counsel fees are not authorized, CSEA argues that Title IV of the LMRDA represents the type of explicit, comprehensive and exclusive remedial scheme that bars an intervenor's recovery of attorney's fees. *See Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967). In support, CSEA notes that other LMRDA Titles make specific provision for attorney's fees or other appropriate relief, while Title IV does not have a specific remedial provision.[5] CSEA also points out that Congress rejected a bill, H.R. 8342, 86th Cong., 1st Sess. § 402(a) (1959), which would have provided for union member suits under Title IV, and would have authorized the award of attorney's fees.

We do not accept CSEA's statutory preclusion argument. Supreme Court decisions after *Fleischmann* have enunciated a presumption against statutory preclusion of courts' traditional power to grant attorney's fees in appropriate circumstances. *See, Hall, supra; Mills, supra.* In *Hall*, the court upheld a "common benefit" award of attorney's fees to a union member in his successful Title I action despite the fact that Title I provides only for "such relief (including injunctions) as may be appropriate," and does not, like Titles II and V, explicitly mention attorney's fees as a form of available relief.[6]

Mills and *Hall* express an unwillingness to infer Congressional intent to preclude awards of attorney's fees unless the statutory remedies have been " 'meticulously detailed' ", *Hall, supra*, 412 U.S. at 9, or there has been a " 'definitive and absolute setting of the Congressional face against the giving of such incidental relief by the courts where compatible with sound and established equitable principles,' " *id.* at 12. We cannot say that Title IV represents this type of comprehensive remedial scheme. As the

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[5] *See* note 3, *supra.*

[6] The *Hall* court stated:

> Confronted with a virtually identical situation in *Mills*, we explained that the inclusion in certain sections of the Securities and Exchange Act of 1934 of express provisions for recovery of attorneys' fees "should not be read as denying to the courts the power to award counsel fees in suits under other sections of the Act when circumstances make such an award appropriate. . . ."
>
> 412 U.S. at 11 [citation omitted].

many decisions interpreting Title IV's provisions suggest, the courts have had to flesh out the details of the Title IV enforcement scheme. *See Usery, supra,* 543 F.2d at 387.

Nor are we persuaded that the courts are precluded from awarding attorney's fees to intervenors because Congress rejected a private enforcement scheme and entrusted the Secretary of Labor with the primary responsibility for enforcing Title IV. The legislative history of Title IV reveals that Congress focused on the relative merits of public versus private enforcement – it did not consider the possibility of union members intervening in suits brought by the Secretary or the propriety of awards to successful intervenors. *See Brennan, supra,* 554 F.2d at 595; *Usery, supra,* 543 F.2d at 387. Moreover, as our discussion of the "common benefit" award of attorney's fees indicates, Congress created a significant role for the individual union member in Title IV's enforcement scheme. This supports our conclusion as "legislatures do not ordinarily create roles – strong roles – and then deny their existence by refusing to recognize the existence of the means to fulfill them effectively." *Brennan, supra,* 554 F.2d at 599.

Congress opted for the public enforcement scheme to protect unions from frivolour litigation by individual union members and to avoid multiple suits by allowing the Secretary to consolidate all meritorious compliants concerning a union election in a single proceeding. As the *Trbovich* court recognized in upholding union members' rights to intervene in suits brought by the Secretary, "There is no evidence that Congress was opposed to participation by union members in the litigation, so long as that participation did not interfere with the screening and centralizing functions of the Secretary." 404 U.S. at 532-33. Similarly, we believe that Congress did not intend to interfere with the courts' equitable powers to award attorney's fees to Title IV intervenors if the award does not conflict with the above statutory goals.

Justice White has argued that such a conflict does arise if attorney's fees are assessable against a union on behalf of intervenors. He suggests that the adjudication of whether an intervenor has conferred a "common benefit" on his fellow union members would involve the "burdensome multiple litigation" Congress sought to avoid. *See Sadlowski, supra,* 435 U.S. at 978. We disagree.

We do not think that the court's resolution of what fees, if any, are appropriate in cases such as this amounts to "burdensome multiple litigation." "[T]he primary objection to the provision for member suits was that it might lead to multiple litigation in multiple forums, and thereby impose on the union the severe burden of mounting multiple defenses." *Trbovich, supra,* 404 U.S. at 534. None of these evils are presented when an intervenor petitions the court for attorney's fees. The court and the parties are fully familiar with the contribution, if any, made by intervenor's counsel. Thus, the additional burden to the union in responding to the petition is minimal.

Finally, we reject the suggestion that awarding attorney's fees in Title IV cases will invite unnecessary intervention and create a disincentive to the Secretary's own rigorous enforcement of the statute. Although the Secretary has declined to take a position on the propriety of awarding attorney's fees, he has acknowledged that Carter's counsel did provide some valuable assistance. We think that the award of attorney's fees where intervenors have made a real contribution will enable intervenors to obtain the necessary legal assistance without threatening the Secretary's predominant role in the enforcement scheme. *See Brennan, supra,* 554 F.2d at 599; *Usery, supra,* 543 F.2d at 385 n.45. Accordingly, we hold that an award of attorney's fees to Carter is consistent with Title IV of the LMRDA.

Judge Miner cut the requested allowance from $38,785.86 to $7,112.10. Those fees that were granted were predominantly for counsel's work done preliminary to, and not duplicative of, the Secretary's representation. The judge allowed fees for only a small fraction of counsel's time spent once the Secretary had taken over. We believe that such limitation encourages proper attention to the initiation of complaints without conflicting with the policy of limited intervention.

We agree with the district court's disposition of the application for fees, with the exception of the denial of fees for counsel's time spent on the fee application itself. The fee application is a necessary part of the award of attorney's fees. If the original award is warranted, we think that a reasonable amount should be granted for time spent in applying for the award.

Judge Miner, in denying this aspect of the request for fees, cited *Colpo v. Teamsters Local 326*, 531 F. Supp. 573 (D. Del. 1982). There, the court relied upon "common fund" precedents to deny a Title IV intervenor's request for attorney's fees for work on the fee application itself. In "common fund" cases the attorney seeking fees has a conflict with his clients, who are to recover out of a fund secured in the litigation, because the award of "fees for fees" further depletes the common fund. The *Colpo* court confused "common benefit" with "common fund." In LMRDA "common benefit" cases, the benefit is the vindication of statutorily-conferred rights, not a fund that would be depleted by an award of attorney's fees. Thus, there is no conflict of interest between the attorney and his client that would preclude compensation for time spent in litigating the fee application. *See Pawlak v. Greenawalt*, 713 F.2d 972, 980-84 (3d Cir. 1983), *cert. denied*, 104 S. Ct. 707 (1984). We hold that Carter should be awarded an additional $1,537.50 (20.5 hours x $75) for her counsel's work, adequately recorded, in preparing the fee application itself.

Carter also appeals that aspect of Judge Miner's decision denying fees for counsel's work on the appeal of the nominating procedures issue. We agree with Judge Miner that counsel's efforts on the appeal duplicated the work of the Secretary; both the Secretary and Carter briefed the nominating procedures issue and responded to CSEA's cross-appeal regarding Carter's alleged failure to exhaust internal union remedies.

We do not view the work done by counsel in argument of the appeal to be sufficiently distinct from the Secretary's representation or beneficial to the union membership to warrant compensation for such work. Once a record has been made in the district court, the Secretary's need for additional assistance is minimal.

We affirm the decision of the district court granting Carter $7,112.10 in attorney's fees and add to that the sum of $1,537.50 for the fee application, a total of $8,649.60. The case is remanded for entry of an order in accordance with this opinion.

APPENDIX A
Decision of the United States District Court, Northern District, New York, July 26, 1985

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

RAYMOND J. DONOVAN, Secretary of Labor, United States Department of Labor,

Plaintiff,

– and –

HELEN CARTER,

Plaintiff-Intervenor,

– against –

CSEA LOCAL UNION 1000,
AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO,

Defendant.

ORDER **83-CV-108 (Miner, J.)**

The motion of Intervenor Helen Carter for an award of attorneys fees having come on for hearing before this Court on July 26, 1985, and the Court having considered the motion and rendered a decision on the record, it is hereby

ORDERED that attorneys fees and costs be awarded to the Intervenor in the amount of $7,112.10.

Dated: July 30, 1985

ROGER J. MINER, U.S.D.J.

THE COURT: The secretary has expressly declined to adopt a position as to the propriety of the legal basis of a fee award in a Title IV case.

However, the Secretary has commented on the intervenor's contributions to this law suit as follows, and I quote:

"First, counsel for intervenor aided the Department in the preparation of the instant action by providing documentation and argument to satisfy the agency that the defendant union was a labor organization and was engaged in an industry affecting commerce within the meaning of the LMRDA. This material identified the private sector not-for-profit corporations whose employees were represented by CSEA. These submissions did not duplicate any efforts of the Secretary and supported the investigation findings that the Secretary had probable cause to find the union subject to the requirements of the LMRDA.

"Second, counsel for intervenor aided the Department prior to the filing of the Secretary's complaint in the instant action by providing material to show his client Carter had exhausted her internal union remedies. Such exhaustion is a statutory prerequisite to the Secretary exercising jurisdiction to investigate the union member's complaint. 29 U.S.C. Section 482(c). Because of the limited 60-day time period available under the LMRDA to investigate a member's allegations, counsel's framing of issues and submission of materials aided the Secretary's investigation. 29 U.S.C. Section 402(b).

"Third, the Secretary acknowledges certain assistance by counsel for intervenor during the secretary's appeal to the Court of Appeals for the Second Circuit of this court's denial of Plaintiff's motion for summary judgment on defendant's nominating procedures and the defendant's Cross-Appeal of this Court's denial of its motion for summary judgment on internal exhaustion. Intervenor's counsel served as a ready reference for information, especially of acts pertaining to the intervenor and exhaustion of union remedies. Counsel further cooperated with the department by an agreement to share the time alloted for oral argument by the Court of Appeals. While the Secretary briefed his positions on both the Appeal and Cross Appeal, the Secretary was able

under the agreement to use all the oral argument time on the appeal of the alleged nominating procedure violation and not duplicate oral argument to the court on the cross-appeal issues." That is the end of the quote from the information furnished by the Secretary.

One could hardly consider these comments to evidence any intervenor "who materially aided the Secretary of Labor in successfully prosecuting the case so as to have conferred a benefit on the union's membership." *Rollison v. Hotel Motel Employees*, 677 F.2d 741, 748 (9th Cir. 1982). Nor may this be said to reflect "ongoing and vital" assistance. *Donovan v. Local 70, Teamsters*, 661 F.2d 1199 (9th Cir. 1981).

While the Secretary's comments were not as strong as they have been in other cses, I think the case law justifies a fee award generally. It must, however, reflect the extent of the intervenor's assistance. Most appealing to me is the decision on the remand of *Brennan v. United Steelworkers*, 501 F. supp. 912 (W.D. Pennsylvania, 1981). The District Court adopted a magistrate's factual finding that no benefit was conferred and no fees were required. The Third Circuit affirmed in part and reversed in part. *Marshall v. United Steelworkers*, 666 F.2d 845 (3rd Cir. 1981), *cert. denied* 459 U.S. 823 (1982). The Court allowed fees for time spent in exhausting union remedies and filing a complaint with the Secretary. Fees for the period after the secretary took over were denied. Primarily as duplicative or as more for the benefit of one candidate and not for common benefit.

So it makes sense in this case for me to award reasonable fees, and fees to assure vigorous attention to the initiation of complaints, but not to conflict with the ploicy underlying limited intervention. Fees should be allowed only for a small fraction of the time spent once the secretary has taken over.

So of the 344 hours submitted for billing, I have subtracted 131 1/4 hours for work on Carter's suit before Judge Sifton. And that leaves 212.75 hours.

From that I have subtracted 20.5 hours spent on fee application. *See Colpo v. Teamsters Local 326*, 531 F. Supp.573 (D.Del. 1982). The application for fees to get fees are not allowed.

I also then disallowed counsels recent supplemental application for hours spent on the second trip, for 10.5 hours, and no expense of $236.60, and there remains then 192.25 hours, and I subtracted the 25 hours spent or planned to be spent on appeal – although the Secretary commented on intervenor's participation here, it could only have been duplicative. Leaving 167.25 hours in light of the Secretary's representation and I would cut that in half, and 83.5 hours and I am allowing $75.00 a hour, the prevailing rate in this district, because counsel played at best a secondary role here. And 83.5 hours times $75.00 is $6,262.50.

Allowing $524.60 for expenses, and that $6,787.10.

For local counsel, I have allowed a total of 6.5 hours at $50.00 an hour for $325.0, and I added to the $6,787.10 the sum of $325.00, for local counsel, and the total award is $7,112.10.

An order may be submitted by 5:00 o'clock Thursday, referring to the decision on the record. (Whereupon the procedures were concluded.)

DONOVAN v. CSEA, #85-6238

WINTER, *Circuit Judge*, dissenting:

Because I agree with the views expressed by Justice White in his dissent from the denial of certiorari in *United Steelworkers v. Sadlowski*, 435 U.S. 977 (1978), I respectfully dissent.

APPENDIX A
Decision of United States District Court, Northern District, New York, July 19, 1984

RAYMOND J. DONOVAN, Secretary of Labor,
United States Department of Labor,

Plaintiff,

—and—

HELEN CARTER,

Plaintiff-Intervenor,

—v.—

CSEA LOCAL UNION 1000,
AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO,

Defendant.

No. 83-CV-108.
United States District Court,
N.D. New York.
July 19, 1984.

ORDER MINER, District Judge.

I

The present motion by the Secretary for partial summary judgment, Fed.R.Civ.P. 56(a), is addressed to that aspect of the Secretary's complaint which charges that defendant CSEA's June 15, 1982 mail ballot election violated § 401(e) of the Labor-Management Reporting and Disclosure Act ("LMRDA") by imposing unreasonable candidacy requirements and thereby denying union members the right to be candidates. The heart of the challenge is not to the election itself but rather to the nominating procedures. On June 29, 1984, this Court granted the Secretary's motion for partial summary judgment on his claim that the election violated the LMRDA's secret ballot provisions. A transcript of that decision is appended hereto and incorporated herein.

II

Nominations for the CSEA election are governed by Article IV of the union's constitution. A statewide nominating committee,

consisting of members selected by the executive board of each of six regions, is required by the constitution to select at least two nominees for the statewide positions of president, executive vice-president, secretary and treasurer. Nominees are selected from among those union members in good standing who have timely submitted a "Request to Be a Candidate" form. In 1982, the committee consisted of eighteen appointed members, and a plurality vote of the committee was required for a nominee to be placed on the ballot.

The constitution provides no written guidelines to committee members in their selection from among eligible nominees. Members are free to use their own judgment in casting their votes for a candidate. What qualifications are required for statewide office are not set forth in any written or oral instructions to members. The union's position in this litigation, however, is that the committee selects the best qualified candidates.

Nominations are also placed on the ballot automatically by the committee for those incumbent officers who choose to run again for office. All incumbents chose to be on the ballot in 1982 and were successful in retaining three of the four statewide officer positions. A union member who is rejected by the committee may seek to have his or her name placed on the ballot by independent petition. He or she then has a period of approximately six weeks from notice of the committee's rejection to obtain signatures of not less than two percent of the CSEA members, which in 1982 meant obtaining over 3,800 signatures in six weeks from members located throughout New York State.

Only one of the candidates on the 1982 ballot was placed there by official petition. Four candidates were incumbents who needed only to consent to be on the ballot, and only four candidates were nominated by the committee for the four positions, although the constitution requires at least two nominations for each position and places no bar to a greater number of nominees.

III

Section 401(e) of the LMRDA, 29 U.S.C. § 481(e) provides, in pertinent part:

> a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 of this title and to reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice . . . .

Whether a particular procedure is reasonable and capable of uniform application depends to a great extent on its consistency with the purposes of the Act. The main purpose of the Act, of course, is to prevent undemocratic practices in union governance. "Thus, any qualifications that unduly interfere with a free choice of candidates are at cross-purposes with [the Act] and are not 'reasonable.' " *Donovan v. Local Union No. 120, Laborers' International Union*, 683 F.2d 1095, 1102 (7th Cir.1982).

> The Supreme Court has considered the reasonableness of a qualification for office under § 481(e) on two occasions. In [*Wirtz v. Hotel, Motel and Club Employees Union, Local 6*, 391 U.S. 492, 88 S.Ct. 1743, 20 L.Ed.2d 763 (1968)] the Court invalidated a union rule that restricted eligibility for major union offices to those who held, or who had previously held, some union elective office. The rule was found not to be a "reasonable qualification" because it rendered 93% of the union membership ineligible for higher office, thus making free and democratic elections impossible. Similarly, in [*Local 3489, United Steelworkers of America v. Usery*, 429 U.S. 305, 97 S.Ct. 611, 50 L.Ed.2d 502 (1977)] the Court found a meeting attendance rule invalid because it excluded 96.5% of the union membership from office. The Court decided that the antidemocratic effects of the rule outweighed any benefits derived from it.

683 F.2d at 1102-03 (footnotes omitted).

The present case does not fall precisely within the holdings of either of those two cases. In *Wirtz v. Hotel, Motel and Club Employees*, 391 U.S. 492, 88 S.Ct. 1743, 20 L.Ed.2d 763, however, the Court provided some general guidance when it noted that "Congress plainly did not intend that the authorization in § 401(e) of 'reasonable qualifications uniformly imposed' should be given a broad reach. The contrary is implicit in the legislative history of the section and in its wording. . . ." *Id.* at 499, 88 S.Ct. at 1748. The Court went on to conclude that in elections, "the assumption is that voters will exercise common sense and judgment in casting their ballots." *Id.* at 504, 88 S.Ct. at 1750.

In the instant case, ten CSEA members sought nomination for office by submitting "Request to be a Candidate" forms. The Secretary argues that although the committee was not limited by the union's constitution to a maximum number of candidates per office, it selected only two candidates for president, one each for executive vice-president and treasurer, and none for secretary. As a result, the Secretary concludes, the committee's procedures reduced the opposition to all incumbents who chose to re-run for these elected offices.

The Secretary concedes that unions have a legitimate interest in imposing minimum standards for candidacy and office-holding in the organization but urges that a balance must be struck with "the dominant purpose of the Act [which] is to ensure the right of members to participate fully in governing their union and to make its officers responsive to the members." 29 C.F.R. § 452.35.

Although the nomination procedures challenged here imposed no express qualification requirements, the thrust of the Secretary's attack is that the nominating committee substituted its judgment for that of individual union members. In particular, the Secretary argues that two committee members appeared to have weighed experience in prior CSEA office as a factor in determining qualification for candidacy. Although here not a formally articulated policy, this type of requirement is precisely the type struck down by the Supreme Court in *Wirtz v. Hotel, Motel and*

Club Employees, 391 U.S. 492, 88 S.Ct. 1743, 20 L.Ed.2d 763. *See also Wirtz. v. National Maritime Union*, 399 F.2d 544, 550 (2d Cir.1968) ("It must be left to the judgment of each member to determine in particular instances how much weight to give to prior experience").

Even more importantly, the Secretary challenges the fact that the committee was acting in the absence of any valid criteria or guidelines, leaving each committee member with unbridled discretion to determine who would be candidates, thereby precluding any uniform imposition of requirements. The decision of the Seventh Circuit in *Donovan v. Local Union No. 120, Laborers' International Union*, 683 F.2d 1095 (7th Cir.1982), offers compelling support for the Secretary's position. Although that case dealt with a formal competency requirement embodied in the union's constitution, the reasoning of the court is equally persuasive here:

A second and related problem, also noted by the Secretary in 29 C.F.R. § 452.53 is the subjectivity inherent in the application of a vague and general qualification. Without further definition, a judgment that a candidate is or is not "competent to perform the duties of the office" is almost totally subjective. Therefore, the decision to disqualify is largely discretionary, even arbitrary. The question of who judges the qualification becomes vital to its reasonableness under § 481(e). In the case at bar, the decisionmakers were three Judges of Election appointed by the incumbent Board. When so much discretion is placed in the hands of those chosen by the incumbents, the possibilities for abuse are clear, and free and democratic elections are threatened.

• • • • •

The vague and subjective nature of a competency qualification also brings it into conflict with the specific mandate of § 481(e) that reasonable qualifications be "uniformly imposed." In this case, the district court found "that the Judges of Election did not apply uniform guidelines in considering the competency of candidates appearing before them," and that neither the Local nor the Judges of Election "adopt[ed] any specific factors

to be considered in determining the competency of a candidate under Article V, Section 3." Due to the significant role of personal judgment in determining "competency," it is unlikely that there can be uniform application of the provision. Unlike a qualification for office relating to the minimum age or the minimum length of union membership of the candidate, a competency provision cannot be applied with the precision and certainty necessary to ensure it is "uniformly imposed." A literacy requirement similar to that imposed by the Local's Constitution might be capable of uniform application if certain objective tests are administered to measure ability to read and write. A candidate's competency, on the other hand, cannot be readily determined by an objective test; a candidate's fitness for the office of union president, for example, cannot be readily determined by an objective test; a candidate's fitness for the office of union president, for example, cannot be readily determined by tests for leadership, loyalty and administrative ability. Though the office at issue in this case, that of Secretary-Treasurer, might make relevant some sort of objective test for record-keeping or accounting ability, there are no tests to evaluate the other, less tangible, qualities associated with "competency."

A final antidemocratic effect results because the competency provision prevents the membership from making just the sort of evaulation elections are intented to provide. It is certainly true, as the Local submits, that in the abstract competency is a most appropriate qualification for office. Congress intended to ensure competent office holders through the provisions of the Act. However, Congress intended that competent officers be provided through a system of free and democratic elections, not through a screening of candidates by a tribunal using a standard vague enough to allow it to veto any particular candidate.

As stated by the Court in *Hotel Employees*, 391 U.S. at 504, 88 S.Ct. at 1750, "Congress' model of democratic elections was political elections in this country .... [T]he assumption is that voters will exercise common sense and judgment in casting their ballots." The Local's system of having a tribunal pre-judge the competency of candidates for office does not correspond to the process of policital elections. As stated by the Secretary: "In union

elections as in political elections, the good judgment of the members in casting their votes should be the primary determinant of whether a candidate is qualified to hold office." 29 C.F.R. § 452.35 (1981).

We conclude that the requirement of competency, lacking an objective standard, permits arbitrary and subjective barring of candidates by the Judges of Election. By its nature it cannot be uniformly imposed, and it is likely to obstruct the democratic process intended by Congress. Accordingly, it does not qualify as a "reasonable qualification" for office under 29 U.S.C. § 481(e), capable of being "uniformly imposed."

683 F.2d at 1104-05.

This holding appears to impel the conclusion that CSEA's nominating procedures similarly are violative of the Act.

Moreover, consistent with the holding in *Donovan v. Local 120*, the Secretary contends that CSEA's process further violates the Act because potential candidates are not put on notice as to the specific standards that will be employed by the committee in determining his or her candidacy. The *Local 120* court wrote:

> [T]he requirement that a candidate be competent to perform the duties of the office he seeks is vague and does not provide the potential candidate with notice of the specific standards he must meet to get on the ballot. This problem is emphasized by the Secretary, to whom Congress has given a significant role in the administration of the Act. The Secretary has stated:
>
> > An essential element of reasonableness is adequate advance notice to the membership of the precise terms of the requirement. . . . Qualifications must be specific and objective. They must contain specific standards of eligibility by which any member can determine in advance whether or not he is qualified to be a candidate. For example, a constitutional provision which states that

> "a candidate shall not be eligible to run for office who intends to use his office as a cloak to effect purposes inimical to the scope and policies of the Union" would not be a reasonable qualification within the meaning of section 481(e) because it is so general as to preclude a candidate from ascertaining whether he is eligible and would permit determinations of eligibility based on subjective judgments. Further, such a requirement is by its nature not capable of being uniformly imposed as required by section 481(e).

29 C.F.R. § 452.53 (1981). A competency qualification suffers from the same deficiencies as the example set forth by the Secretary. The term "competent" is general and ambiguous, and when made a qualification for office does not allow a member to take steps to ensure that he will be eligible for the ballot. The qualification is antidemocratic to the extent it discourages potential candidates by its vagueness.

683 F.2d at 1103-04.

The court harbors no doubts that, standing alone, the CSEA procedures discussed above are indeed antithetical to and therefore violative of the fundamental purposes of the Act. These procedures, however, do not stand alone; instead, they are supported by alternative nominating procedures, freely and reasonably available to those union members who aspire to elected office. While, concededly, the need to submit a petition reflecting two percent membership support (in this case, just over 3,800 names) presents more difficulty for a nomination-seeking union member than the simple expedient of submitting a "Request to be a Candidate" form to the nominating committee, that alternative cannot be found to provide less than a "reasonable opportunity." Any contention to the contrary is belied both by the factual record before the Court and by the interpretation given those words by relevant case law. There is nothing inherently unreasonable in requiring a prospective candidate to garner and demonstrate minimal membership support. Indeed, the precise manner of gathering such support necessarily is embodied in any

candidate's campaign itself. Because any prospective candidate is free to have his or her name placed on the ballot simply by attracting minimal rank and file support, he or she is afforded reasonable opportunity to become a candidate.

Viewed as a "qualification" requirement, the petitioning route is at once both manifestly reasonable and consonant with the purposes of the Act. First, it assures that qualification is measured solely in terms of membership support; second, it is the democratic voice of the union electorate that determines just such qualification. Because "the reasonableness of qualifications for office depends to a great degree on the extent to which members are not prevented from running for office and the extent to which the membership can make a free electoral decision," *Donavan v. Local 119, International Union of Electrical, Radio & Machine Workers*, 548 F.Supp. 997, 1003 (E.D.Pa.1982), *modified*, 548 F.Supp. 1004 (E.D.Pa.1982), the independent ballot inclusion device made availble by CSEA satisfies the statutory requirements.

As a factual matter, the record makes clear that the petition requirement here provided more than reasonable opportunity for members to gain candidate status. Most significantly, the only member who opted for such a route was overwhelmingly successful in her endeavor. Indeed, she attributes her ultimate election victory directly to her petitioning efforts. The process was both inexpensive and informal, and was compatible with the electoral desires of anyone who aspired to union leadership.

The Court rejects the Secretary's characterization of the procedure as potentially stigmatizing, since the ballot itself does not in any way reflect how a candidate's name came to appear thereon. Moreover, since, as the Secretary contends, union members are completely unaware of the factors going into candidate nomination, there is no reason to believe that candidates lacking committee endorsement would be perceived as less qualified.

Because members desirous of candidacy had a reasonable opportunity to have their names placed on the ballot and because the general membership was thereby assured an opportunity to

exercise their vote in a wholly democratic fashion, there is no merit to the Secretary's position and the nominating procedures cannot be said to violate the LMRDA.[1] In light of this disposition, and in accordance with this Court's previous determination of June 29, voiding the 1982 election, the only question remaining is that of remedy.

Under section 402(c) of the LMRDA, 29 U.S.C. § 482(c), the Secretary is to conduct a new election "so far as lawful and practicable, in conformity with the consitution and bylaws of the labor organization." While the Secretary seeks a new election within ninety days, CSEA argues that as a matter of equity, it should be permitted to have the new election conducted in June of 1985 at its regularly scheduled time. The dilemma facing the Court is a distressing one. The great expense of conducting an immediate new election and then another in less than a year seems a high price to pay in a case where, as here, there was no evidence of fraud or bad faith, but rather only mistaken judgment. On the other hand, to allow the present elected officers to remain in office for another eleven months notwithstanding the taint imposed on their offices by the violative 1982 election would do a great disservice to the democratic principles that serve as the cornerstone of the LMRDA.

In support of its equitable argument, CSEA relies on the decision of the Second Circuit in *Usery v. International Organization of Masters, Mates and Pilots*, 538 F.2d 946 (2d Cir.1976). While that decision expressed general equitable concerns, particularly over the union's incurring unnecessary expenses, the facts of that case are sufficiently distinguishable from those present here. First, the taint from the challenged election had been diminished somewhat by an unsupervised, though proper, intervening election. Second, at the time the Secretary was to conduct the election,

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1. The Secretary also argues briefly that CSEA's method of automatically placing incumbents' names on the ballot constitutes a separate and additional violation of the Act. While there may be merit to this contention, the Court need not address it here since counsel for CSEA represented to the Court at oral argument that that procedure no longer will be employed.

certain electoral problems had not yet been resolved and an immediate election might have been itself subject to a later re-run.

Were the present regularly scheduled election less than eleven months away, the equities would lie more clearly in CSEA's favor. *See Donovan v. Local 10902, Communications Workers of America*, 650 F.2d 799, 802 (5th Cir.1981). While the Court would view it as impractical and unwise to require two elections within the course of little more than one year, that appears to be the desired remedy as expressed by counsel for all parties during oral argument. Accordingly, the Secretary hereby is directed to conduct the re-run election within ninety days of the date of this Order, the new officers to hold office until what would have been the expiration of the 1982-1985 term. The next election will therefore be the next regularly scheduled triennial election to be held in June of 1985.

While the Court interferes with the normal functioning of intraunion affairs reluctantly, it does so in the sincere believe that such intervention is necessary to ensure the effectiveness of the LMRDA and the vitality of union democracy.

It is so ordered.

APPENDIX

THE COURT: I am prepared to rule with respect to both motions presently before me. First, with respect to defendant CSEA's motion for partial summary judgment.

Part of the instant action challenges the results of a mail ballot election, the results of which were announced at 6:00 p.m. on June 15, 1982. The complaint alleges that the election denied union members the right to be candidates by imposing unreasonable candidacy requirements and by failing to conduct the election by secret ballot in violation of 29 U.S.C. Section 481. In February of 1982, Helen Carter submitted her request to be a candidate. Her request was denied on March 1, because she

was not a member in good standing since June 1 of 1981. On March 5, Carter protested that decision by letter to CSEA. That protest was denied. On April 30, Carter filed a second pre-election protest. That protest was denied as untimely, although it is unclear how it was untimely since CSEA's bylaws have no provision regarding pre-election protests.

On June 15, at 6:00 p.m., the results of the election were officially announced by issuance of a press release and mailing of telegrams to candidates. By letter dated June 22, received by CSEA on June 24, Carter filed a post-election protest concerning a number of alleged violations. On June 25, Carter had a telegram phoned to CSEA adding an additional protest regarding the nominating procedure. The confirmation of the oral telegram was received by CSEA on Monday, June 28th. CSEA, on July 14th rejected Carter's protest regarding nominating procedures as untimely not having been made within ten days of the alleged violations.

CSEA now moves for summary judgment on the issue of the nominating procedures arguing that Carter's failure to protest timely means that she had not exhausted internal union remedies and that both she and the secretary are therefore barred from maintaining this claim.

CSEA's bylaws provide that protests concerning the results of an election must be filed with the executive director of the association by certified mail, return receipt requested, within ten days of the official announcement of the results of the election. Because 29 U.S.C. Section 482(a) requires exhaustion of internal remedies prior to filing a complaint with the secretary, CSEA claims that suit on this issue is precluded.

I find CSEA's position to be without merit. First, it is arguable that Carter's protest was not timely received. Second, even if it wasn't, CSEA's hypertechnical construction of its bylaws is at odds with the purposes of the Labor-Management Reporting and Disclosure Act.

While the election results were officially announced on June 15th, making June 25th the last day on which to file protests, the announcement was not made until 6:00 p.m. and then only through a press release. The results appeared in the June 18th issue of "Public Sector," CSEA's official newspaper, which many members would not receive until later in the week, and indeed, Carter herself did not receive the paper and therefore the results until June 21st, or 22nd. By announcing at 6:00 CSEA shaved a day off the ten-day requirement. At the very least, since 6:00 was after the close of business on the 15th, Carter should have had until after the close of business on the 25th; since that was a Friday, she had until Monday the 28th when CSEA received the written confirmation of her June 25th telegram. While the bylaws required certified mail, surely a telegram confirmation serves the same purpose and should therefore be a satisfactory substitute.

In *Hodgson versus Local 67999 of the United Steelworkers*, 403 U.S. 333, 91 S.Ct. 1841, 29 L.Ed.2d 510 (1971), the Supreme Court stressed the importance of internal exhaustion of union procedures. The Court emphasized, however, that the analysis of the exhaustion problem "must reflect the needs of rank and file union members – those people the requirement is designed ultimately to serve." 403 U.S. at 340, 91 S.Ct. at 1846. "Courts should impose a heavy burden on the union" to show that it did not have adequate notice, and "members should not be held to procedural niceties while seeking redress within their union." Page 431, Note 6. Here, not only did Carter notify the union with her pre-election protest, but also with her oral protest on June 25th. It is clear that CSEA's policy of notifying members of the official results was not designed to facilitate member protests but rather to impede them. *See Hodgson against Liquor Salesmen's Union, Local 2*, 444 F.2d 1344, 1349 (2d Circuit 1971): "Such procedural perversion of the exhaustion requirements of Section 402(a) will not be permitted." Under 29 U.S.C., Section 482(a), internal union procedures, including time limitations, must be flexibly applied. *Donovan against Local 1235, International Longshoreman's Association*, 715 F.2d 70, 74 (3d Circuit 1983).

At Page 76 of the Donovan against Local 1235, Third Circuit Case:

> "Members of a union, however well informed of its procedure for appeal, deal not with an outside agency whose interests are hostile to theirs but with their own union which should seek to reach a disposition of their grievances on the merits rather than on procedural technicalities. Union officials must be discouraged from adopting with their own members the same adversarial role which they may more appropriately play when acting on behalf of those members in negotiations with their employer."

Because the procedural default here was, if anything, entirely insignificant, I find that there was sufficient compliance to indicate exhaustion. Accordingly, CSEA's motion must be denied.

A more troublesome question is presented by the secretary's motion for summary judgment with respect to the secret ballot requirements, largely because a violation, if proved, precipitates a most drastic remedy, in the form of an order that the election be rerun under the supervision of the secretary.

The mail election challenged here was conducted by providing CSEA members with perforated ballot forms. The top portion contained voters' names and social security numbers and they were required to sign it for verification purposes. The bottom portion was the actual ballot. The forms were then mailed to the Independent Election Corporation of America. Voters were informed that their signature was required for validation purposes only and would be removed before counting, but that ballots without signatures would not be counted. In all, 197,000 ballots were mailed out; 51,000 were returned to IECA; 5600 were not counted because of the absence of voter signatures. There is no dispute that IECA maintained secrecy in its processing of ballots. However, the secretary urges that the secrecy requirement of 29 U.S.C. Section 481(b) was violated both because ballots did not contain names when they went to IECA and because Gregory Szurnicki, chairman of CSEA's election procedures committee

reviewed approximately 30 ballots with names for purposes of validation.

Section 481 of the LMRDA provides that every local labor organization shall elect its officers not less often than once every three years by secret ballot among the members in good standing.

Section 402(k) provides " 'secret ballot' means the expression by ballot, voting machine, or otherwise, but in no event by proxy, of a choice with respect to any election or vote taken upon any matter, which is cast in such a manner that the person expressing such choice cannot be identified with the choice expressed."

There is no question that a secret ballot is mandatory.

CSEA argues but provides no authority, that it does not matter that IECA saw voter names, since the concern of the statute is that union members and officials, not third parties, not be able to associate voters with their vote.

It is clear, however, the CSEA violated the secrecy provision, since voters were capable of being identified with their ballots. The potential chilling effect is at the heart of the Act since voters are doubtless reluctant to have their votes attributed to them. Certainly, this somewhat explains why 5600 voters neglected to add their names, and perhaps why some members chose to not vote at all.

The instructions accompanying the ballot did not fully cure the problem since voters could not be certain who would see their ballots. All they were told was that their votes were confidential and that ballots would be tabulated by IECA. There could be no assurance to the reticent member that his vote would truly remain anonymous. Two cases in this area manifest an overwhelming preference for absolute secrecy. *Marshall against Local 12447, United Steelworkers*, 591 F.2d 199, 203 (3d Circuit 1978):

"The definition is phrased in mandatory terms: The ballots must be marked in such a matter that the voter cannot be identified with his choice. It is clear that in this election some voters

could have been identified with their choices. It is also clear that the union did not take the steps which would have made certain that voters could not be identified with their preferences."

In a footnote of that opinion it indicates how strictly the secrecy requirement is to be construed:

> "The evidence showed only that, because of the way the election was conducted, it was possible to observe how some voters had marked their ballots. This, we believe, was sufficient to show a violation of the Act where reasonable steps have not been taken to require members to vote in secrecy."

In mail-ballot elections, the secretary's regulations, codified at 29 C.F.R. 452.97(a), suggest a proper method for insuring secrecy, a method not employed here:

"The ballot must not contain any markings which upon examination would enable one to identify it with the voter. Balloting by mail presents special problems in assuring secrecy. Although no particular method of asserting such secrecy is presented, secrecy may be assured by the use of a double envelope system for return of the voted ballots with the necessary voter identification appearing only on the outer envelope."

In *Bachowski versus Brennan,* 413 F.Supp. 147, 150 (W.D.Pa.1976), appeal dismissed, 545 F.2d 363 (3d Circuit 1976), the Court noted:

> "The requirement of secrecy would seem to include not only the right to vote in secret but also the right to secrecy after the ballots are cast. Any post-voting device by which it can be determined how a particular voted would be a violation of secrecy (such as signatures or other identifying marks on the ballot, or extracting each ballot from the ballot box and examining it immediately after it has been cast).

> "By imposing the requirement of secrecy Congress meant to eliminate any form of potential coercion or intimidation which might occur if it could be learned in any manner how an individual voter had voted.
>
> "Any violation of the right to secrecy either at the time of voting or by subsequent procedures of handling the ballots constitutes a substantive and material infringement of the voter's rights, and also of the candidates' rights to a fair and honest competition for the suffrages of the union members.
>
> "As plaintiff's counsel points out, 'Secrecy and safeguards are for the benefit of the challenger and the absence of secrecy and safeguards can only benefit the incumbent who controls the machinery of the union and can affect votes through fear or hope of favor.' "

The problem here is even more acute since a member of the union's election committee actually reviewed some ballots with voters' names suggesting that voter fears of anonymity may not have been unrealistic. It is clear then that the ballots were not secret.

The question that remains is one of remedy. Section 482(c) directs the Court, if it finds that a violation has occurred which may have affected the outcome of the election, to void the election and order a new one under the secretary's supervision. In *Wirtz against Hotel, Motel and Club Employees' Union*, 391 U.S. 492, 88 S.Ct. 1743, 20 L.Ed.2d 763 (1968), the Supreme Court established that once a violation was established, a prima facie case had been made out that the violation "may have affected" the outcome. Evidence rebutting such a finding may not rest on conjecture but only on "tangible evidence against the reasonable probability that the violation did affect the outcome." 391 U.S. at 508, 88 S.Ct. at 1752.

The burden is thus substantial. In this type of case, "There is no conceivable way in which defendant can confront and overcome the imponderables inherent in analyzing the decisions made

by each elector . . . in choosing to vote or not to vote and in selecting the particular candidate for whom to vote . . . ."

Usery against International Organization of Maters, Mates and Pilots, 422 F.Supp. 1221, 1226-27 (S.D.N.Y.1976). Here, 5600 votes were not counted and 150,000 members did not even vote. The only effort made by CSEA to show no affect is to point to margins of victory. For example, the president won by a vote of 25,785 to 11,675; executive vice-president 22,928 to 20,017, and treasurer, 22,173 to 13,144. Those figures, however, are meaningless since it remains to be seen whether secret ballots would have encouraged the 5600 non-signing voters to cast meaningful ballots, but the nonvoting members as well. CSEA also argues that no one other than Carter complained, but that too is irrelevant. It is also irrelevant that CSEA had a good election history. In short, CSEA has come forward with no evidence that the lack of secrecy did not affect the election.

Accordingly, a new election is required. It is no defense that such relief is unfair or unreasonable, since upon a violation a new election is mandatory under the statue.

While the remedy doubtless is a severe one, that is the price to be paid for vindicating the important congressional goal of ensuring union democracy.

Two weeks from today, a motion is returnable by the secretary as I understand it, relating to the nominating procedures. Although I have announced my determination with these motions in the record, the final order shall await the determination on that motion unless the parties advise me otherwise.

(Whereupon proceedings in the above-entitled matter were concluded.)

CERTIFICATION

I, HIRAM F. SHEFFER, Official Court Reporter for the United States District Court, in and for the Northern District of New York, do certify this to be a true and accurate transcript of the stenographic record of the foregoing taken at the time and place noted in the heading hereof.

/s/ _____
HIRAM F. SHEFFER
Official Court Reporter
United States District Court
Northern District of New York

APPENDIX A

Decision of United States Court of Appeals, Second Circuit, May 1, 1985

RAYMOND J. DONOVAN, Secretary of Labor,
United States Department of Labor,

Plaintiff-Appellant, Cross-Appellee,

HELEN CARTER,

Plaintiff-Intervenor,

—v.—

CSEA LOCAL UNION 1000,
AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO,

Defendant-Appellee, Cross-Appellant,

HELEN CARTER,

Intervenor.

Nos. 714, 715, Dockets 84-6292, 84-6308.

United States Court of Appeals,
Second Circuit.

Argued Feb. 8, 1985.
Decided May 1, 1985.

CARDAMONE, Circuit Judge:

This action, instituted by the Secretary of Labor under the Landrum-Griffin Act of 1959, challenges the 1982 election of statewide officers of the Civil Service Employees Association (CSEA or Union) in New York based upon a complaint made by a union member. At the heart of the Landrum-Griffin Act is the premise that unions should conduct their internal affairs through democratic processes. Some believe that like Don Quixote, Congress was attempting the near impossible task of repealing the "iron law of oligarchy" inherent in large-scale one-party organizations. Thus, it falls upon courts construing the Act to

effectuate its premise in the face of the strong tendency toward obligarchic control that is an inevitable result of a single-party structure. Contrary to the court below, we conclude that the nominating procedure at issue violates the Act because it gives an unfair advantage to incumbents and other members of the union hierarchy. Accordingly, we reverse.

As a result of Helen Carter's complaint, the instant action was brought by the Secretary of Labor under Title IV of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§481-483 (1982) (LMRDA or Act). The Secretary sought an order from the United States District Court for the Northern District of New York (Miner, J.) declaring that the CSEA had violated § 401(b) of the Act by failing to conduct an election for its statewide offices by secret ballot. 29 U.S.C § 481(b). He also sought an order declaring that the CSEA had violated § 401(e) of the Act by: (1) imposing unreasonable candidacy requirements; (2) imposing candidacy requirements in a non-uniform manner; (3) denying members in good standing a reasonable opportunity to nominate candidates; and (4) denying members in good standing the right to be a candidate. 29 U.S.C. § 481(e). The Secretary sought a new election conducted under his supervision. The CSEA denied these allegations and asserted as an affirmative defense that the district court lacked jurisdiction because Carter had failed to exhaust her internal union administrative remedies as required by § 402(a). 29 U.S.C. § 482(a).

I. *CSEA's 1982 Election*

A. *Nominating Procedures*

Representing employees of the State of New York and its various political subdivision, the CSEA has almost 200,000 members. The Union is divided inot 6 regions, 313 locals, and 933 units. Most of its locals have fewer than 500 members. Nominations for election to its statewide offices of President, Executive Vice-President, Secretary and Treasurer are governed by article IV, section 5(b) of its Constitution and Bylaws, which provides for a statewide nominating committee made up of three members from each of the six regions. Members of the committee are selected by the

executive board of each CSEA region, and not by the rank and file. The committee is required to select at least two candidates for each statewide office from among those members in good standing who have timely submitted a "Request to Be a Candidate" form. A potential candidate must receive a plurality vote of the committee to be placed on the ballot. In 1982 the constitution provided that incumbent officers who wanted to be candidates were automatically placed on the ballot.

Neither the constitution nor any other document provides guidelines for committee members to use in selecting candidates. The record indicates that committee members have based their decisions to vote for or against particular candidates on such attributes as education, expertise, experience, and involvement in CSEA activities. The committee members have derived this information from the submitted forms and their personal knowledge of the candidates. A CSEA member seeking statewide office who is rejected by the committee may still have his or her name placed on the ballot if the member is able to obtain the signatures of two percent of the membership on a petition within six weeks of being turned down by the committee. The signature requirement was 3,800 based on 1982 membership.

All four incumbents chose to be placed on the ballot for the 1982 election. Seven members applied to be candidates. The committee nominated four and rejected three, including Carter who was seeking to be Secretary. In total, the Committee nominated three individuals for President, two for Executive Vice-President, two for Treasurer, and only one, the incumbent, for Secretary. Of the four incumbents all but the Treasurer were reelected. Only one of the three members who was rejected successfully obtained the signatures needed to win a spot on the ballot. The record does not reveal whether either of the other two attempted to obtain signatures.

B. *Helen Carter's Protests*

The only provision in the CSEA Constitution and Bylaws concerning election protests is in article III, section 2 and states that a member must file a protest with the Executive Director of the

CSEA by certified mail within ten days of the official announcement of the election results. Prior to the election Helen Carter had protested to the CSEA Board of Directors and to the statewide election procedures committee regarding the nominating committee's selection of condidates. She was informed that her protest was untimely – because the Union's constitution did not provide for pre-election protests – and that a response by the CSEA to her protest would be inappropriate because she had instituted a federal action. (That action has been indefinitely stayed by the Eastern District.)

The CSEA's mail ballot election was conducted on June 15, 1982 and the results of the election were telegrammed to the candidates that same day. The official results were published in the June 18th edition of the CSEA newspaper. Carter sent a letter making numerous protests about the election to the Executive Director. On June 25, the last day of the ten-day period, she sent a telegram – orally communicated to the Union that same day – in which she amended her protest to allege that the nominating procedure was "arbitrary and discriminatory" in violation of the LMRDA. The Union received a written confirmation of the amended election protest on June 28, the next business day. The statewide election procedures committee informed Carter that her protests were untimely because they had not been made within ten days of the date the events she complained about occurred. As a result, Carter complained to the Secretary, who instituted the present action in the district court.

II. *District Court Ruling and Rerun Election*

The district court 594 F.Supp.188, held that the CSEA had violated § 401(b) of the Act by failing to conduct its election by secret ballot, and ordered the CSEA to hold a new election within 90 days. 29 U.S.C § 481(b). It further held that the nominating procedures did not violate § 401(e) of the LMRDA. 29 U.S.C § 481(e). Noting that the CSEA apparently did not know until just prior to the 1982 election that its elections were subject to the Act, the district court then held that the use of the nominating committee, standing alone, violated the Act. But the district judge

went on to hold that the alternative procedure, which allowed members rejected by the committee to obtain a place on the ballot by submitting a petition signed by 3,800 members, provided a reasonable alternative to the concededly unreasonalbe committee method of nominating. The Secretary's motion for summary judgement regarding the nominating procedures was therefore denied. The CSEA's motion for partial summary judgment was also denied upon the court's finding that Carter had exhausted her internal union remedies before submitting her complaint to the Secretary.

Pursuant to the district court's order, the CSEA held a rerun election. The election was supervised by the Secretary, and members voted by secret ballot. Prior to the district court's decsion, the CSEA had agreed to discontinue its practice of automatically placing incumbents' names on the ballot. Moreover, in the rerun election, the Union on its own initiative required a member rejected by the committee to obtain only 1,000 petition signatures in order to have his or her name placed on the ballot.

[1] The election held pursuant to the court order does not moot this appeal. *See Donovan v. Local 120, Laborers' International Union*, 683 F.2d 1095, 1098-99 (7th Cir.1982). Instead, determination of the issues raised will provide the Union with guidance in holding future elections, including its regularly scheduled triennial election to be held in June 1985. This appeal presents two question: first, whether the district court correctly held that Helen Carter had exhausted the remedies available to her under the CSEA Constitution and Bylaws; and if so, whether the district court erred as a matter of law in holding that the CSEA nominating procedures, when considered as a whole, were reasonable.

III. *The Exhaustion Requirement*

[2] Section 402(a) of the LMRDA provides that before the Secretary may interfere with union election procedures, a union member must have either exhausted his or her union remedies,

or invoked them without receiving a final decision for three months. 29 U.S.C § 482(a).[1] The purpose of the exhaustion requirement is to give a union an opportunity to remedy Title IV violations and thus avoid unnecessary governmental intrusion. *Hodgson v. Local 6799, United Steelworkers*, 403 U.S. 333, 338-39, 91 S.Ct. 1841, 1845-46, 29 L.Ed.2d 510 (1971). But "any interpretation of the exhaustion requirement must reflect the needs of rank and file union members – those people the requirement is designed ultimately to serve." *Id.* at 340, 91 S.Ct. at 1846. As a consequence, a heavy burden is imposed on the union to demonstrate that it did not have adequate notice of the protest, keeping in mind that "members should not be held to procedural niceties while seeking redress within their union." *Id.* at 341 n.6, 91 S.Ct. at 1846 n.6.

In light of these well-established principles, the district court correctly found that Carter had exhausted her internal union remedies. The trial court observed that Carter had notified the Union of her protest to the nominating procedures prior to the election. Further, it found that Carter's June 25 telegram protest, which is the only one at issue on this appeal, was sent within the ten-day period following the official announcement of the election results, as required by the Union's Constitution and Bylaws. The district court correctly found no merit to the CSEA's contention that it had not received adequate notice because there was no provision for an amended election protest in the constitution. Moreover, the fact that Carter's protest was not sent by certified mail and not received in writing until three days after the

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[1] Section 402(a) of the Act, 29 U.S.C. § 482(a), provides:

> A member of a labor organization –
>
> (1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or
>
> (2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation, may file a complain with the Secretary within one calendar month thereafter alleging the violation of any provision of section 481 of this title....

expiration of the ten-day period does not defeat her claim. Union members, no matter how well-informed of union appeal procedures, are not dealing with a hostile third party but with their own union which is obligated to consider and decide a member's protest on the merits – not on a legal nicety. *See Donovan v. Local 3122, Communications Workers*, 740 F.2d 860, 862 (11th Cir. 1981) (missed deadline by two or three days was "exceedingly technical violation" not warranting dismissal); *Donovan v. Local 1235, International Longshoremen's Association*, 715 F.2d 70, 75-76 (3d Cir. 1983) (protestors' efforts to examine constitution and bylaws that union said was unavailable excused ten-day compliance); *Hodgson v. Liquor Salesmen's Union Local 2*, 444 F.2d 1344, 1349-50 (2d. Cir.1981) (fact that protest not received in time because of postal strike excused compliance).

IV. *Nominating Procedures*

A. *Purpose of Title IV of the Act*

[3] Section 401(e) of the Act mandates that in union elections subject to the LMRDA:

> a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject...*to reasonable qualifications uniformly imposed*) and shall have the right to vote for or otherwise support the candidate or candidates of his choice...

29 U.S.C. § 481(e) (emphasis added). The determination of whether a particular qualification is reasonable and capable of uniform application under Section 401(e) must be made in light of the purpose of Title IV of the Act. *Local 3489, United Steelworkers v. Usery*, 429 U.S. 305, 309, 97 S.Ct. 611, 614, 50 L.Ed.2d 502 (1977). The Act's principal aim is to promote democracy in union governance, and the thrust of Title IV is that members be allowed to exercise their own judgement in selecting candidates for office. *Wirtz v. Hotel, Motel & Club Employees Union, Local 6*, 391 U.S. 492, 504, 88 S.Ct. 1743, 1750,

20 L.Ed.2d 763 (1968). Thus, any method of selecting candidates which unduly interferes with members' free choice is unreasonable.

Inherent in any organization are factors that impede the exercise of free choice and contribute to the ability of those in power to maintain control. *See* Summers, *Democracy in a One-Party State: Perspectives from Landrum-Griffin*, 43 Md.L.Rev. 93, 96-99 (1984). Unlike candidates in a two-party system, those challenging incumbent union leaders are often viewed as disloyal to the union. In addition, control over the union's bureaucracy enjoyed by union leaders gives them an opportunity to perpetuate themselves through the dispensation of patronage. Moreover, power over the channels of communication, while subject to restriction, is another means of maintaining power. The tight grasp of incumbent leaders should be recognized when a court interprets LMRDA union election requirements so that opposition voices can be heard and their weight felt. Summers, *supra*, at 99.

B. *CSEA Nominating Procedures Violate the Act*

[4] The Union concedes that certain aspects of its nominating procedure are violative of the Act. It has discontinued the automatic placement of incumbents on the ballot. It also agrees that the selection of candidates by the nominating committee, standing alone, violates the Act, but argues that we should adopt the district court finding that the petition alternative makes the nominating procedure reasonable when considered as a whole. We cannot agree. In determining whether the nomination procedure as a whole violated the Act, we first address why use of the nominating committee and its use of subjective criteria, standing alone, violates the Act.

The vague and subjective criteria used by the nominating committee members, who are selected solely by the regional executie committees, is a deterrent to potential candidates and inhibits members from exercising their own judgment. The Department of Labor's Regulations expressly distinguish between reasonable

qualifications capable of uniform application and qualifications which permit subjective determinations of eligibilty:

> An essential element of reasonableness is adequate advance notice to the membership of the precise terms of the requirement.... Qualifications must be specific and objective. They must contain specific standards of eligibility by which any member can determine in advance whether or not he is qualified to be a candidate.... Further, [a subjective] requirement is by its nature not capable of being uniformly imposed as required by section 401(e).

29 C.F.R § 452.53 (1984). In *Local 120, Laborers' International Union*, the Seventh Circuit struck down a requirement that an election panel screen candidates for "competency," finding that the requirement "permit[ted] arbitrary and subjective barring of candidates...[and b]y its nature [could] not be uniformly imposed." 683 F.2d at 1105. The court found that it "discourages potential candidates by its vagueness." *Id.* at 1104.

Moreover, the process results in the substitution of the judgment of committee members for the advised view of the rank-and-file members and thereby leads to the indirect use of prohibited criteria. *See Wirtz v. National Maritime Union*, 399 F.2d 544, 549-50 (2d Cir. 1968). In *National Maritime Union*, in which the union required candidates to have prior office-holding experience, we said:

> While we would hesitate to say that experience gained in one of the lower offices bears no relation to a candidate's ability to perform as a national officer, the Supreme Court quite clearly has pointed out that it is for the rank-and-file union members to distinguish qualified from unqualified candidates. It must be left to the judgment of each member to determine in particular instances how much weight to give to prior experience.

399 F.2d at 550 (citation omitted).

[5] After thoroughly discussing these aspects of the CSEA committee nominating process, the district court held that although the committee process, standing alone, was violative of the Act, the nominating procedure taken as a whole was not. In its view a member's opportunity to gain a place on the ballot by obtaining the required number of signatures provided a reasonable opportunity to nominate candidates and therefore made the nomination procedure reasonable as a whole. In our view the petition requirement does save the nominating procedure. When the petition requirement is used in conjunction with the committee nominating process the nominating procedure as a whole violates the Act because it fails to comply with the requirement that qualifications be uniformly imposed.

In light of the rule that "qualification" requirements must be uniformly imposed under § 401(e) of the Act, 29 U.S.C § 481(e), the petition requirement violates the LMRDA because it imposes a significant burden not imposed on those selected by the committee. *See National Maritime Union*, 399 F.2d at 548 (the petition requirement violated the Act because it "was not uniformly inposed since only anti-administration candidates were obliged personally to secure the forms and endorsements"). Scrutiny of such burdens is especially critical on account of the advantage that incumbents or committee-selectees naturally enjoy relative to rank-and-file members. Union officers are rarely unseated, and when such an upset does occur, it is generally one of the union hierarchy and not a rank-and-file member who takes the prize.

[6] In addition to finding the procedure as a whole violative of the Act because the petition alternative is not capable of being uniformly imposed, we find the 3800-signature petition requirement itself unreasonable under the facts of this case. We recognize that the use of petitions is expressly recognized under the Department of Labor's Regulations as a permissible means

of nomination. *See* 29 C.F.R § 452.57.[3] But any petition requirement must still be tested for reasonableness. 29 U.S.C § 481(e). In making such a case-by-case assessment, requirements under other union constitutions and the geographical distribution of the subject union's membership are relevant criteria.

Upon examining the petition requirement of other unions, we find that only a few pre- and post-LMRDA union constitutions have such a requirement. U.S Department of Labor, *Union Constitution Provision: Election and Tenure of National and International Union Officers* 7 (1958); U.S. Department of Labor, *Union Constitutions and the Election of Local Union Officers* 52 (1965). This small number includes those constitutions requiring endorsement by a specified number of members at a nominating meeting or by a specified number of locals. A scan of the distribution of CSEA membership, as noted earlier, reveals that most CSEA locals have fewer than 500 members and the average local has far fewer. In order to obtain 3,800 signatures from members in good standing, a potential candidate would have to obtain the signature of every member in at least seven locals. As a matter of law, this requires more than a showing of minimal support. *See National Maritime Union*, 399 F.2d at 548 (petition requirement held unreasonable where many members

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[3] Section 452.57 Procedures for Nomination.

> (a) Since the Act does not prescribe particular procedures for the nomination of candidates, the labor organization is free to employ any method that will provide a reasonable opportunity for making nominations. There are various methods which, if properly and fairly employed, would be considered reasonable under the Act. For example, nominations may be by petition, or from the floor at a nomination meeting.
>
> (b) Whether a particular procedure is sufficient to satisfy the requirements of the Act is a question which will depend upon the particular facts in each case. While a particular procedure may not on its face violate the requirements of the Act, its application in a given instance may make nomination so difficult as to deny the members a reasonable opportunity to nominate.

29 C.F.R. § 452.57 (1984).

served in ships at sea even though fewer that 100 needed to endorse candidate for national office). At the same time, the 1,000 petition signatures required by the Union in its rerun election is not unreasonable as a matter of law.

In arguing that requiring 3,800 signatures is reasonable, the CSEA points to the affidavit of a member who had been rejected by the committee but who nonetheless succeeded in obtaining 3,800 signatures, and in fact, unseated the incumbent. That member was able to collect over 5,000 signatures by sending petitions to local presidents and treasurers, and to members of the CSEA Board of Directors. While it is to the credit of that particular member to have mounted a successful campaign, we note that she was a union member of longstanding, who had served in numerous leadership positions in her local and region, and had been a state convention delegate and served on various CSEA committees. This activity provided her with extensive contacts among union leadership throughout the state. Her success simply illustrates that on those rare occasions when there is a turnover in a leadership position, the successful challenger is usually from the union hierarchy and not from the membership of the rank-and-file. Although experience and demonstrated leadership at a local or regional level is an important factor for a voting union member to consider, it may not—consistent with the purpose of Title IV—give an individual a significant advantage in seeking the nomination.

V. *Remedy*

[7] We come to the remaining question. What is the remedy? The Secretary urges that the case be remanded to the district court with directions that it order the CSEA to conduct another rerun election under his supervision. The Secretary seeks to have a second supervised election despite the fact that the first rerun of the 1982 election was held under his supervision where he found no violations that may have affected the outcome of that election. We see no point in repetition. In the interest of finality of election results, one rerun is enough. Further, supervised rerun elections are costly and disruptive to a union. Although the parties

agree that the propriety of the CSEA's 1982 nominating procedures was not mooted by the supervised rerun election, that election limits the relief we may order. *See Local 120, Laborers' International Union*, 683 F.2d at 1098-99. Thus, while the disposition of this appeal does not affect the results of the supervised election, our determination will be applicable to the regularly scheduled June 1985 election and to future elections.

Accordingly, the district court order is affirmed insofar as it concluded that Helen Carter had exhausted her internal union administrative remedies. Insofar as the district court found the CSEA nominating procedures reasonable and not in violation of the 1959 Act, the order appealed from is reversed and the case is remanded to the district court with directions to enter an order consistent with this opinion including in particular a provision that 1,000 signatures on a candidate's petition for CSEA statewide office are sufficient.

APPENDIX B
29 U.S.C. §481

TITLE IV — ELECTIONS

Terms of Office; Election Procedures
(29 U.S.C. 481)

SEC. 401. (a) Every national or international labor organization, except a federation of national or international labor organizations, shall elect its officers not less often than once every five years either by secret ballot among the members in good standing or at a convention of delegates chosen by secret ballot.

(b) Every local labor organization shall elect its officers not less often than once every three years by secret ballot among the members in good standing.

(c) Every national or international labor organization, except a federation of national or international labor organizations, and every local labor organization, and its officers, shall be under a duty, enforceable at the suit of any bona fide candidate for office in such labor organization in the district court of the United States in which such labor organization maintains its principal office, to comply with all reasonable requests of any candidate to distribute by mail or otherwise at the candidate's expense campaign literature in aid of such person's candidacy to all members in good standing of such labor organization and to refrain from discrimination in favor of or against any candidate with respect to the use of lists of members, and whenever such labor organizations or its officers authorize the distribution by mail or otherwise to members of campaign literature on behalf of any candidate or of the labor organization itself with reference to such election, similar distribution at the request of any other bona fide candidate shall be made by such labor organization and its officers, with equal treatment as to the expense of such distribution. Every bona fide candidate shall have the right, once within 30 days prior to an election of a labor organization in which he is a candidate, to inspect a list containing the names and last known addresses of all members of the labor organization who are subject to a collective bargaining agreement requiring

membership therein as a condition of employment, which list shall be maintained and kept at the principal office of such labor organization by a designated official thereof. Adequate safeguards to insure a fair election shall be provided, including the right of any candidate to have an observer at the polls and at the counting of the ballots.

(d) Officers of intermediate bodies, such as general committees, system boards, joint boards, or joint councils, shall be elected not less often than once every four years by secret ballot among the members in good standing or by labor organization officers representative of such members who have been elected by secret ballot.

(e) In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 and to reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind by such organization or any member thereof. Not less than fifteen days prior to the election notice thereof shall be mailed to each member at his last known home address. Each member in good standing shall be entitled to one vote. No member whose dues have been withheld by his employer for payment to such organization pursuant to his voluntary authorization provided for in a collective bargaining agreement shall be declared ineligible to vote or be a candidate for office in such organization by reason of alleged delay or default in the payment of dues. The votes cast by members of each local labor organization shall be counted, and the results published, separately. The election officials designated in the constitution and bylaws or the secretary, if no other official is designated, shall preserve for one year the ballots and all other records pertaining to the election. The election shall be conducted in accordance with the constitution and bylaws of such organization insofar as they are not inconsistent with the provisions of this title.

(f) When officers are chosen by a convention of delegates elected by secret ballot, the convention shall be conducted in accordance with the constitution and bylaws of the labor organization insofar as they are not inconsistent with the provisions of this title. The officials designated in the constitution and bylaws or the secretary, if no other is designated, shall preserve for one year the credentials of the delegates and all minutes and other records of the convention pertaining to the election of officers.

(g) No moneys received by any labor organization by way of dues, assessment, or similar levy, and no moneys of an employer shall be contributed or applied to promote the candidacy of any person in an election subject to the provisions of this title. Such moneys of a labor organization may be utilized for notices, factual statements of issues not involving candidates, and other expenses necessary for the holding of an election.

(h) If the Secretary, upon application of any member of a local labor organization, finds after hearing in accordance with the Administrative Procedure Act that the constitution and bylaws of such labor organization do not provide an adequate procedure for the removal of an elected officer guilty of serious misconduct, such officer may be removed, for cause shown and after notice and hearing, by the members in good standing voting in a secret ballot conducted by the officers of such labor organization in accordance with its constitution and bylaws insofar as they are not inconsistent with the provisions of this title.

(i) The secretary shall promulgate rules and regulations prescribing minimum standards and procedures for determining the adequacy of the removal procedures to which reference is made in subsection (h).

Enforcement

(29 U.S.C. 482)

SEC. 402. (a) A member of a labor organization -

(1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or

(2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation,

may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section 401 (including violation of the constitution and bylaws of the labor organization pertaining to the election and removal of officers). The challenged election shall be presumed valid pending a final decision thereon (as hereinafter provided) and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide.

(b) The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this title has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary and in accordance with the provisions of this title and such rules and regulations as the Secretary may prescribe. The court shall have power to take such action as it deems proper to preserve the assets of the labor organization.

(c) If, upon a preponderance of the evidence after a trial upon the merits, the court finds -

(1) that an election has not been held within the time prescribed by section 401, or

(2) that the violation of section 401 may have affected the outcome of an election,

the court shall declare the election, if any, to be void and direct the conduct of a new election under supervision of the Secretary and, so far as lawful and practicable, in conformity with the

constitution and bylaws of the labor organization. The Secretary shall promptly certify to the court the names of the persons elected, and the court shall thereupon enter a decree declaring such persons to be the officers of the labor organization. If the proceeding is for the removal of officers pursuant to subsection (h) of section 401, the Secretary shall certify the results of the vote and the court shall enter a decree declaring whether such persons have been removed as officers of the labor organization.

(d) An order directing an election, dismissing a complaint, or designating elected officers of a labor organization shall be appealable in the same manner as the final judgment in a civil action, but an order directing an election shall not be stayed pending appeal.

Application of Other Laws
(29 U.S.C. 483)

SEC. 403. No labor organization shall be required by law to conduct elections of officers with greater frequency or in a different form or manner than is required by its own constitution or bylaws, except as otherwise provided by this title. Existing rights and remedies to enforce the constitution and bylaws of a labor organization with respect to elections prior to the conduct thereof shall not be affected by the provisions of this title. The remedy provided by this title for challenging an election already conducted shall be exclusive.

Effective Date
(29 U.S.C. 484)

SEC. 404. The provisions of this title shall become applicable -

(1) ninety days after the date of enactment of this Act in the case of a labor organization whose constitution and bylaws can lawfully be modified or amended by action of its constitutional officers or governing body, or

(2) where such modification can only be made by a constitutional convention of the labor organization, not later than the next constitutional convention of such labor

organization after the date of enactment of this Act, or one year after such date, whichever is sooner. If no such convention is held within such one-year period, the executive board or similar governing body empowered to act for such labor organization between conventions is empowered to make such interim constitutional changes as are necessary to carry out the provisions of this title.